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Sentencing Women: Evidence for APPG for Women in the Penal System

1. Magistrates sentencing to the guidelines

Magistrates must always use guidelines produced by the Sentencing Council in coming to a final decision about the appropriate sentence to be imposed in any given case. Offence-specific sentencing guidelines suggest the appropriate range within which a sentence should fall, given the seriousness of offence, the culpability of the offender and the harm caused. The court is obliged by law to follow these guidelines unless it is in interests of justice to diverge from them. Magistrates decide culpability and harm levels. The guidelines give a starting point and a range within which it is expected that the sentence will fall for each category. Once sentencers have established the appropriate sentencing range for a particular case, they must then take into consideration any aggravating and mitigating factors. These will relate to the specific offence, as well as the personal circumstances of the offender. Other factors including an early guilty plea must also be taken into consideration.

Magistrates must sentence to the specific circumstances of the offence and the offender. To do this, they need detailed and relevant information about the offender and appropriate, available community options. This information is provided to the court through the prosecution, defence, the offender themselves and the National Probation Service (NPS). The NPS produce Pre-Sentence Reports (PSRs) which should include relevant information about the offender as well as possible sentencing options. PSRs can be short reports given on the day (usually oral), or a more detailed written report which means adjourning the case. The courts may also receive information about the offender from a Liaison and Diversion (L&D) report which may be provided through the case file (if a L&D assessment was carried out in the police station) or via the PSR. A L&D report should identify relevant vulnerabilities, mental health or substance abuse issues that may affect sentencing decisions.

Magistrates need to know what the individual's circumstances and vulnerabilities are, who else will be affected by any sentence given, and what sentence is likely to be effective in supporting rehabilitation. To achieve this, it will be important for NPS staff delivering reports to have a thorough knowledge of what community options are able to provide. It can also be helpful if the court indicates what possible sentencing options they think should be included in the report.

Current Sentencing Council guidelines state it can be helpful for a court to indicate any “preliminary opinion as to which of the three sentencing ranges is relevant and the purpose(s) of sentencing that the package of requirements is expected to fulfil.”¹ It is important that in doing so, the court makes it clear that all sentencing options remain open to the sentencing court.

Although sentencers cannot give preferential treatment to women when sentencing, there are certain issues that are more prevalent for women that should be considered as to whether they are pertinent to specific individuals. For example, Sentencing Guidelines now require the impact of a sentence on any dependants to be considered. So any childcare or other caring responsibilities of women would affect the sentence.

2. Sentencing Options:

a) Community sentence options (12 requirements);

As part of either a Community Order (CO) or Suspended Sentence Order (SSO), there are 12 requirements that can be used by sentencers. Sentencers will need information from NPS before ordering requirements involving specific programmes or treatment to ensure they are appropriate to the individual.

Rehabilitation activity requirement (RAR)

This requirement was introduced with a view to allowing Community Rehabilitation Company’s (CRCs) to introduce innovative interventions to address offending, and decisions on the activities to be undertaken by the offender are not finalised until after the sentence has been imposed. The court specifies the maximum number of days for activities, but the CRC selects what rehabilitative requirements will be included as part of the RAR. The bench is not required to be given any detail of what would be included under a RAR. Although this allows greater flexibility for CRCs in deciding the precise elements of the requirement after more in depth assessment of the offender, it can greatly reduce the information available to the court when deciding whether it is an appropriate sentence.

Some CRCs run specific RARs for women offenders, some based in women’s centres, some on an outreach basis, but available options appear to be widely different depending on the CRC. Not all options will necessarily be available throughout the area covered by the CRC as some services, including women’s centres, may only be available to those resident in particular local authority areas.

Research has shown that women can find probation offices intimidating especially where they might run the risk of encountering a violent ex-partner. Probation offices are also not good places to take children. The MA has supported suggestions that the minimum requirement on CRC contracts should be for a day or half day to be specified as women-only so that there is no risk of encountering potentially violent male offenders when attending appointments. It may be worth exploring the possibility of conducting the initial appointment at court immediately after sentencing, which would at least mean that the offender would know what would be included in the sentence and have a plan to work to. This would require close liaison between NPS and CRC staff, and a likelihood that a community sentence will be ordered by the court.

Where there are women’s centres, CRCs can use these to host supervision appointments. However they are not available in all locations, and it is important that there are alternative women only locations where appointments can be held.

¹ <https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive-Guideline-Imposition-of-CCS-final-web.pdf>

Rehabilitation via programme requirements

Other rehabilitative activities may be imposed separately as programme requirements, which usually involve group work. Including women in group work designed for men is far from ideal in most situations, and having one or two in a male group is not likely to create the safe environment necessary to allow any value to be obtained from the work. Magistrates have highlighted the tendency for women to provide support for each other, and the value this may add to rehabilitative work. Again, availability of gender specific programmes is inconsistent. Sentencing benches often have little information about how and where a programme would be carried out.

Treatment Requirements

Treatment Requirements include Mental Health Treatment Requirements (MHTRs), Alcohol Treatment Requirements (ATR) or Drug Rehabilitation Requirements (DRR). These requirements offer health support as part of a criminal justice sanction, so they require different agencies to work together, as well as an indication from the offender that they are willing to engage with the specific treatment. There is not local provision for these requirements across all of England and Wales; especially the MHTR, which needs the involvement of a mental health professional. Other difficulties in relation to giving Treatment Requirements include offender's accessing the service within the necessary timeframe of a community sentence, lack of options for offenders with dual diagnosis or complex needs and funding for bespoke services for offenders.

Unpaid work

Unpaid work is often used as a punitive element of a court order, either as a sole requirement or in addition to rehabilitative requirements to make a community order at a higher level (which may be sufficiently robust to provide an alternative to custody). However, for those caring for children the standard hours for unpaid work placements (often 9am or earlier to 4pm or later) are not always practical unless they are during school hours and even then this would be difficult if an offender has children under school age. Problems finding suitable childcare can also make complying with unpaid work impossible. There is also the issue of the undesirability of including women in groups that are almost exclusively male (as discussed above). The standard response for those who work and cannot attend work placements during the week is that they can attend during their free time at weekends: however this can be even more difficult for anyone with childcare responsibilities. This is a problem for single parents of any gender but childcare responsibilities are likely to impact disproportionately on women offenders. It is a concern that placements are not always appropriate for most women which may mean a disproportionate number of women are barred from participating in community payback schemes.

There are examples of gender-specific community payback placements, although providing options for a small cohort can mean longer waits until a suitable group can be formed. However, innovative projects establishing work such as sewing or other craftwork to produce goods for charities can be organised in a suitable location and therefore be very successful. For example, in Northamptonshire, The Good Loaf provides an option for women to work in the bakery or café as part of a court order.

Some women's centres are able to offer crèche facilities however even where available these may be tied to particular programmes and may not be available to women undertaking unpaid work.

Curfew

Although overnight curfew can be an appropriate order for women offenders, there are still situations which are disproportionately seen in this cohort which affect the suitability of curfew as a sentencing option. Offenders with children or other caring responsibilities may be reluctant to undergo overnight curfew due to worries such as the potential need to take a sick child to hospital.

Explanations that emergencies would not result in breach action if properly evidenced can help resolve concerns. Specific health considerations, for example for pregnant women, may be relevant if tagging could exacerbate swelling of ankles. Wrist tags should be available where an ankle tag is not appropriate for health reasons, but there can be issues where a wrist tag is not possible, if there is a risk it could be easily slipped off a wrist. Women may also present as reluctant to undertake overnight curfew but be unwilling to discuss the reasons in open court, or even to probation. It is always important to consider the impact of restricting someone to somewhere which may not be a safe place, if there is domestic abuse within the home. Again, of course, escaping violence would be considered an emergency in terms of potential breach, although this assumes the woman is willing to discuss this with their probation officers.

Other aspects to consider would include whether particular instructions need to be given about installation. This might be female officers installing the tag or ensuring attendance in daylight to fit the monitor as there have been instances of women refusing to open the door after dark to an unaccompanied man.

b) Other disposals

Fine

Many women offenders commit acquisitive crimes and fines may be the likely sentence. If offending behaviour is linked to need due to financial difficulties, then fines may aggravate the reasons behind offending behaviour. Payment of fines must take account of an offender's individual situation; this is particularly relevant for those on benefits or low income. This can mean that it can take years for someone to pay off their fines; in addition, any re-offending can result in new fines which are then consolidated with the old and the payment period extended. Where fines are deducted directly from benefits, changes in the type of benefit paid are likely to result in payments being stopped and appearance in court as a fine defaulter.

The MA recommends that Section 151 of the Criminal Justice Act 2003 be commenced, allowing magistrates to hand down a community sentence in cases where an offender has been fined three times previously and the sentence would otherwise only be a financial penalty. Magistrates would be greatly assisted by sentencing options to tackle offending behaviour early before it escalates.

Section 151 would allow rehabilitative measures to be taken at an earlier stage, rather than continuing to allow offending behaviour to escalate. A financial penalty will do nothing to address the underlying causes of repeat offenders' behaviour, whereas measures such as a treatment requirement or a programme requirement may be effective. The MA is happy to examine and discuss measures to ensure that such a procedure does not lead to up tariffing.

In addition, the MA supports the enactment of Schedule 6 of the Courts Act 2003. This would empower the court to order unpaid work if the payment of a fine is deemed impractical or inappropriate. Members of the MA understand that, for some repeat offenders, accumulating financial sanctions - when they have no ability to pay - can put a financial burden on them that is completely impossible for them to pay off. Again, this does not allow people to turn their lives around, but can exacerbate offending behaviour. As in relation to Section 151, the MA are happy to discuss how to ensure sanctions are not escalated and that the measure is used to rehabilitate, rather than further penalise, offenders.

Discharge

Absolute discharge is usually only used where the offender is guilty of an offence but there are reasons for the court to consider any sanctions inappropriate. Conditional discharges are frequently used, especially for low level offences, for first time offenders or where there have been no offences committed for some time.

Custody

A custodial sentence must only be imposed if unavoidable; and then magistrates must consider whether it is possible to suspend the sentence (and give a SSO). However it must be remembered that a SSO is a custodial sentence, and the expectation is that any breach will result in the custodial sentence being activated.

3. Alternatives to custody

The Sentencing Council guidelines on the Imposition of Community and Custodial Sentences state: "Passing the custody threshold does not mean that a custodial sentence should be deemed inevitable. Custody should not be imposed where a community order could provide sufficient restriction on an offender's liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime."

Where the custody threshold has been passed, magistrates are likely to consider that any community order used as an alternative should be of high level. The explanatory materials of the sentencing guidelines suggest that for high level orders, more intensive sentences which combine two or more requirements may be appropriate.

As an alternative to a custodial sentence, therefore, magistrates will need to know that a community sentence of this level is available and practical for the circumstances of the offender. Magistrates also need to consider the number of requirements on an order and be mindful that the order must be workable. Provision of sentencing options for women remains patchy, and the lack of any women-specific community options severely restricts the sentences available to courts.

In Scotland, the Criminal Justice and Licensing (Scotland) Act 2010 introduced a presumption against sentences of less than three months. The Act requires the court to

1. Only pass a sentence of three months or less if no other appropriate disposal is available, and
2. Record the reasons for this view.

Although the MA notes the interest in this policy, and whether it should be brought in for England and Wales, it is unclear how this would change existing practice, where a custodial sentence should not be given if it is avoidable.

In addition, it is not clear whether the presumption against short custodial sentences has actually had the desired effect. Concerns have been raised that the presumption against sentences under 3 months not only had a limited impact, but even possibly resulted in up tariffing so that custody was used.

3. Conclusion

The MA believes there a number of key issues that relate to sentencing women.

- Ensuring the provision of gender-specific community sentencing options. It was worrying that in the recent HMIP report on Enforcement and Recall,² they generally found no clear pathways for women offenders.

² <https://www.justiceinspectorates.gov.uk/hmiprobation/media/press-releases/2018/02/overstretched-private-probation-companies-struggling-with-poor-enforcement-of-community-sentences-inspectors-find/>

- Sentencers rely on NPS to provide details about whether specific requirements are appropriate in a particular case. Programme or Treatment Requirements should only be ordered where appropriate to the individual.
- Sentencer confidence in the enforcement of community sentences is difficult to maintain when official inspectorate reports are assessing the performance of CRCs as poor.³ The MA suggests that while the failings identified should be addressed as a matter of urgency, magistrates should also be given the power to review the progress made by an offender serving a community sentence, to increase the magistracy's confidence in their effectiveness.
- Providing magistrates with relevant information about caring responsibilities, so that the impact of a sentence on dependants can be considered. The MA acknowledges that women may be reluctant to give details to probation officers, but hopes that work such as the videos produced by Dr Shona Minson will raise awareness about the issue. Input from social services or other agencies may be necessary to enable NPS to present a full report to sentencers. There should be greater availability of sentencing options for offenders with multiple vulnerabilities as well as trauma-informed work.
- The importance of stable and secure accommodation and education and/or work options in ensuring successful rehabilitation is also key. Ensuring access to adequate, safe and secure housing can impact on the availability of sentencing options as well as the likely effectiveness of rehabilitation.

³ Ibid.,